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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

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No. 948

CYRUS HIGGINSON, On Behalf of Himself and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit

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Cyrus Higginson, on behalf of himself and all other former landowners, or heirs, successors and assigns thereof, of thirty-six thousand acres, namely

Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky, petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on September 28, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra* pp. i-xvii) is reported at 384 Fed. 2d 504 (1967). The opinion of the District Court (App. B, *infra* pp. xviii-xxiii) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1967 (App. C, *infra,* p. xxiv). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

(1) Whether the United States may sell mineral rights in land, so as to incur very substantial profits, when the land was acquired by the United States from its citizens during a war emergency for a temporary military camp.

(2) Whether in a federal condemnation action a federal court should devise a federal doctrine of real property or apply the already developed law of the state in which the property to be condemned is situated.

(3) Whether, under Kentucky law, property condemned for a temporary use is acquired by the condemning authority as a fee simple determinable or an easement rather than a fee simple absolute.

(4) Whether, under Kentucky law, the condemning authority acquires the mineral rights as well as the surface rights in land condemned for a temporary use.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C. 1346(a) provides:

> "(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally

assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

50 U.S.C. section 171 provides:

"The Secretary of the Army may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided,* That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of the Army shall be reasonable, he

may purchase or enter into a contract for the use of the same at such price without further delay: *Provided further,* That the Secretary of the Army is authorized to accept on behalf of the United States donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes: *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes."

40 U.S.C. section 258 (a) provides:

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation

finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. . . ."

STATEMENT

During the first year after the outbreak of World War II the United States Government condemned all but 16 of the approximately 36,000 acres of land involved herein and established a United States Army Garrison at Morganfield, Kentucky, known as Camp Breckenridge.

This land was obtained from plaintiff and several thousand other former landowners for approximately $3,600,000, or about one hundred dollars ($100.00) per acre.

At the time of the acquisition of the land by condemnation, the former landowners were told by agents of the United States that they would have the right and opportunity to repurchase the land after termination

of the use for which the land was taken. The former landowners were told that the Government was acquiring the land solely for the purpose of constructing and maintaining a *temporary* military camp during the period of the national emergency. At the time of the condemnation proceeding, the former landowners were denied the right to prove the value of the mineral rights involved.

Camp Breckenridge was established as a *temporary* military camp in furtherance of the national war program. The structures and improvements located thereon consisted of World War II temporary construction. Camp Breckenridge was first placed in inactive status during February 1946 and has remainded in inactive status since 1953.

After the abandonment of Camp Breckenridge as a temporary military camp, the Government offered the mineral rights on the subject property for sale. Offers to puchase those rights were received in an amount exceeding $32,000,000. Considering only those offers, that amount spread out over the entire area would equal almost $1,000 per acre, or ten times what the Government paid to the former landowners for their land.

On April 15, 1965, Cyrus Higginson brought a class action under Rule 23(a) of the Federal Rules of Civil Procedure in the United States District Court for the Western District of Kentucky, Owensboro Division, against the United States of America, on behalf of himself and several thousand other former landowners.

The Third Amended Complaint was in two counts. The first count of the Complaint prayed that the Government be directed to sell the property to plaintiffs in accordance with the terms of Section 23(d) of the Surplus Property Act of 1944 (58 Stat. 777). The second count was for judgment under 28 U.S.C. 1346(a) (2), in the sum of $9,300 as "reasonable rental" for the property for the period of occupancy by the Government for the period subsequent to the abandonment of the use of the property as a temporary military camp.

The District Court held that the petitioner failed to state a claim upon which relief could be granted under both counts of the Third Amended Complaint.

The Court of Appeals affirmed the District Court on the merits. The Court of Appeals held that the title taken by federal condemnation under a federal condemnation statute is subject to determination by federal law unless Congress states otherwise. Furthermore, the Court of Appeals held that if Kentucky law were to be applied, the circumstances surrounding the condemnation transaction indicated an intention and purpose to transfer a fee simple title, subject only to certain specified easements.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court. This Court has not

faced the question as to whether the United States may sell at a substantial profit, land which was acquired by eminent domain, from its citizens, during a war emergency for a temporary military camp.

The Court of Appeals has rendered a decision which is in conflict with the decisions of other Courts of Appeals on the same matter. The Court of Appeals has held that the interest acquired in a federal condemnation action is determined by federal law and not by the law of the state in which the land is located, whereas the other circuits which have considered this issue have held that the law of the state in which the land is located is applicable.

The Court of Appeals has decided an important state question in a way in conflict with applicable state law. The Court of Appeals has held that under Kentucky law the interest acquired by the United States was a fee simple absolute. Furthermore, the Court of Appeals held that the United States acquired the mineral rights along with the surface rights in the federal condemnation action.

The first question presented is whether the United States may sell mineral rights in land, so as to incur very substantial profits, when the land was acquired by the United States from its citizens during a war emergency for a temporary military camp.

In 1942, when the United States condemned the land involved, the Government needed the land immediately for purposes of a temporary military camp. The Second World War had just broken out and it

was necessary to have facilities available to train the necessary troops.

At the time of the taking of the land, the former landowners were informed that the Government was acquiring the property solely for the purpose of constructing and maintaining a temporary military camp during the period of the national emergency. The Government did, in fact, only occupy this property for the purpose of a temporary military camp. The taking of the property for a period longer than the period for which it was to be acquired, and the acquiring of rights greater than those necessary for the purpose of the construction and maintenance of a temporary military camp constituted a taking of the former owners' property without due process of law and without payment of just compensation therefor, in violation of the Fifth Amendment to the Constitution of the United States.

Furthermore, the fact that the former landowners were denied the right to prove, at the time of the condemnation proceedings, the value of the mineral rights on and under the properties, constituted a taking of property without payment of just compensation.

At the time of the taking, the former landowners were specifically told that they would be given an opportunity to repurchase the land after the termination of use as a temporary military camp by the Government. The former landowners were told they would be able to purchase the land for the same price paid by them and they relied upon such representations made by Government agents in arriving at the decision

to sell and convey their land for the price agreed upon. Had it not been for these representations and promises, most of the former landowners would not have voluntarily agreed to accept the purchase price.

50 U.S.C. 171 provided that the Secretary of the Army could cause condemnation proceedings to be initiated to condemn land for the site, location, consumption, or prosecution of work for fortifications, coast defenses, military training camps.

The declaration of taking involved stated that the lands to be condemned were condemned under 50 U.S.C. 171.

The declaration stated:

> "The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the establishment of a triangular division camp. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of Camp Breckenridge, Union and Henderson Counties, Kentucky, and for each other use as may be authorized by Congress or by Executive Order, and are required for immediate use."

Nowhere in the declaration of taking or in the authorizing statutory provision is mention made of condemning land for the purpose of selling mineral rights to oil companies. The land was taken only for a temporary military camp. It was not taken to be later sold at excessive profits for oil rights.

The petition in condemnation accompanying each taking stated:

> "The Secretary of War, acting under authority vested in him by said Acts has determined that in his opinion, under said War Purposes Act, it is necessary and advantageous to acquire for the United States of America by condemnation under judicial process, certain lands hereinafter to be described by perimeter descriptions, for the purposes of the acts above set forth, to be utilized for the establishment of a triangular division camp, in furtherance of the national war program."

The declaration of taking stated that 50 U.S.C. Section 171 authorized the *acquisition of land for military purposes.* The petition in condemnation states that the land was to be used *in furtherance of the national war program.* The purpose of the condemnation action was clear.

It is unconscionable for the United States to sell, at a substantial profit, the mineral rights which it claims it acquired when the land herein was obtained. Even *if* the United States did acquire the mineral rights, it would be improper for the Government to sell these mineral rights at so great a profit. This land was obtained during a war emergency from the citizens of the United States for a temporary military camp only. The several thousand citizens who sold their land to the United States during the war emergency for a military camp did so for that reason only. They had no intention of giving to the Government enormously valuable mineral rights.

The United States Government is not in the business of selling mineral rights at terrific profits. This Court

should decide this important question of federal law which has not been decided and thus determine whether the Government of the United States can realize substantial profits on the sale of land taken in an emergency from its citizens.

The second question presented is whether the interest acquired in a federal condemnation action is determined by concepts of federal law or by the law of the state in which the land is located.

The second count of the Third Amended Complaint was brought under 28 U.S.C. 1346(a)(2) to recover rent under an implied contract.

Petitioner contends that when the land was abandoned by the Government as a temporary military camp, under the law of Kentucky, it reverted to the former landowners. The petitioner brought an action against the United States for payment of rent for lands used and occupied by the Government since 1953, since at that time the land reverted to the former landowners. The Government, by retaining the lands, had an implied contract to pay a rental therefor.

This same theory was successfully followed in *Etheridge v. United States,* 218 F.Supp. 809 (E.D.N.C. 1963). In the *Etheridge* case, the plaintiff brought an action for recovery of reasonable rental value of property which had been condemned by the Government for a life-saving station and then abandoned. The Court permitted the plaintiff to recover for the rental value of the land after its abandonment for the

purpose for which it was taken. The *Etheridge* case was under the same section of the Tucker Act as this case. The Court, in *Etheridge,* faced the question of whether the real property conveyed to the United States reverted to the plaintiff when the property ceased to be used by the United States as a Coast Guard Life-Saving Station. The statutory authority gave the Secretary of the Treasury authority to acquire the right to occupy sites for life-saving stations. The Court in *Etheridge,* at page 811, stated that:

> "The entire issue before the Court rests upon the kind of estate conveyed by the deed to the defendant. In determining this point, the substantive law of North Carolina will apply."

In this connection, see also *United States v. Roebling,* 244 F.Supp. 736 (N.J. 1965) and *United States v. Chartier Real Estate Co.,* 226 F.Supp. 285 (R.I. 1964).

The Court of Appeals below stated that:

> ". . . we believe that the nature of title taken by federal condemnation under a federal condemnation statute is subject to determination by federal law, unless Congress states otherwise."

The Court of Appeals, in so holding, has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter. The Court of Appeals for the Fifth Circuit held in *Leiter Minerals, Inc. v. United States,* 329 F.2d 85 (5th Cir. 1964) at page 90 that:

> "We have no doubt that the Congress could make federal law applicable, but we are equally clear

> that it has no intention to do so when it merely authorized the contract by which the United States acquired the property. State law must govern in the absence of federal Statute making federal law applicable."

Leiter Minerals, Inc. v. United States was subsequently vacated by this Honorable Court and dismissed as moot (318 U.S. 413 (1965)). However, this dismissal did not affect the validity of the decision rendered by the Court of Appeals.

There is a decision and rehearing by the Second Circuit Court of Appeals in direct conflict with the decision by the Court of Appeals below in the instant case. In *United States v. Certain Property in Borough of Manhattan,* 306 F.2d 439 (2nd Cir. 1962), the Court held that, in order to determine what interest the United States Government took in condemnation, it is necessary to look to the law of the state in which the property is located. The Court, in an entire section, devoted to the very problem involved herein, entitled: "The Respective Roles of Federal and State Law", states that:

> "Many of the controversies before us hinge on what the Government 'took'. The Government contends that determination of what is taken in Federal condemnation proceedings and the ascertainment of compensation therefor are governed by principles of federal law, and that New York property law concepts are therefore irrelevant. It relies on such unquestionable propositions as that the United States' power of condemnation 'can neither be enlarged nor diminished by a state.

> Nor can any state prescribe the manner in which it must be exercised', *Kohl v. United States,* 91 U.S. 367, 374, 23 L.ed. 449 (1876) and that '. . . where essential interests of the Federal Government are concerned federal law rules unless Congress chooses to make state laws applicable', *United States v. 93.970 Acres of Land,* 360 U.S. 328, 332-333, 79 S.Ct. 1193, 1196, 3 L.ed. 1275 (1959). Acceptance of all this and of the corollary that Federal law governs the principles whereby 'just compensation' is determined in a Federal condemnation still does not establish the conclusion the Government draws from them . . .
>
> We see no basis for doubting that Congress meant that a Federal court, in determining what such a taking embraced, should look to the law of the state where the property is located. Although the Government urges us to look to 'Federal law' to determine what the taking included, it does not tell where to find this—no corpus on Federal law on this subject exists and 1962 seems rather late to start developing one, especially for so limited a function. . . . Although the principle announced in *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188 (1938), would not deprive Congress of Constitutional power to create a separate 'Federal law' as to what constitutes real property for Federal condemnation, see *Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.ed. 838 (1943), the practical considerations for referring to state law for that purpose are overwhelming. All states have bodies of law as to what is real and what is personal property, which they require for a variety of transactions. Persons dealing in land within

a state must conduct themselves in light of state law, which will inevitably govern most of their relations; it would be inconvenient in the last degree if they had also to take cognizance of a Federal property law that would apply only in the rather rare event of a Federal condemnation. Hence we hold that Congress meant us to refer to New York law to determine what the United States acquired when it 'took' what it did here, (citations)."

On rehearing in *United States v. Certain Property in Borough of Manhattan,* 344 F.2d 142 (2nd Cir. 1965), the panel was composed of Judges Moore, Friendly and Marshall. The Court of Appeals' earlier decision was affirmed. The Court stated at page 144 that:

"Most of the points raised by the United States were argued, both initially and on petition or rehearing, on the former appeal, before a panel consisting of Chief Judge Lumbard, Judge Kauffman and the writer. (Judge Friendly) We could rest on our previous opinion both because it is the law of the case (citations), and because we are satisfied with it. But the vigor of the Government's attack, its apparent inability to understand what we decided, and the importance of the issues prompt us to make another attempt to specify our points of agreement and disagreement with its position.

* * * * * * *

Our disagreement rests both on reason and on authority. The *Clearfield* opinion itself noted 'in our choice of the applicable Federal Rule we have

occasionally selected state law'. 318 U.S. at 367, 63 S.Ct. at 575. When there is no substantial evidence of Congressional intent, the decision of a Federal court whether to fashion a set of distinctively federal principles or to follow state rules must turn, in large measure, on the relative importance of nationwide uniformity and of uniform treatment of similarly situated persons in the same state. See Professor Mishkin's perceptive article, The Variousness of 'Federal Law': Competence and Discretion in the Choice of National and State Rules for Decisions, 105 U. Pa. L.Rev. 797, 810-32 (1957). Here the convenience to federal takers and Government lawyers in having the same writ run on both sides of the Hudson is of slight significance as compared to the need for New York businessmen planning to invest in trade fixtures to know that what is real property on Broadway if the City or State condemns it, will be no less real property if taken instead by the Federal Government. . . .

"In our previous opinion, we cited decisions of three other circuits as holding that a federal court will normally apply state concepts of real property in determining what comes within a Federal taking. *United States v. Becktold Co.*, 129 F.2d 473 (8th Cir. 1942); *United States v. 19.86 Acres of Land,* 141 F.2d 344, 151 A.L.R. 1423 (7th Cir. 1944); *Carmichael v. U. S.*, 273 F.2d 392 (5th Cir. 1960)."

It is clear that the above Second Circuit case is directly contrary to the case at issue herein. However, it should be noted that the Sixth Circuit below

did not even refer to or cite once the Second Circuit case, either the original case or the case on rehearing. This is despite the fact that the cases were extensively briefed and argued at the oral argument. In this connection, it should also be noted that *Etheridge v. United States,* supra, also was not dealt with by the Court of Appeals below, although it too was extensively briefed and treated at the oral argument.

There are four circuits contrary to the Sixth Circuit opinion below. These are the Second Circuit *(United States v. Certain Property in Borough of Manhattan,* supra); the Fifth Circuit *(Leiter Minerals, Inc. v. United States,* supra; *Carmichael v. U. S.,* supra); the Eighth Circuit *(United States v. Becktold Co.,* supra); and the Seventh Circuit *(U. S. v. 19.86 Acres of Land,* supra).

The third question presented is whether under Kentucky law the interest acquired in a Federal condemnation action is a fee simple absolute or a lesser interest.

The Court of Appeals held that if Kentucky law applied, the United States would still obtain a fee simple title. The Court of Appeals cited three Kentucky cases: *Craddock v. U. of Louisville,* 303 S.W. 2d 548 (1957); *Kentucky Elec. v. Wells,* 75 S.W.2d 1088 (1934); *Binder v. Board,* 5 S.W.2d 903 (1928).

The Court of Appeals decided an important question of Kentucky law in a way in conflict with applicable Kentucky decisions.

The law of Kentucky is well developed on the point herein involved and it clearly indicates that the description in a declaration of taking in a condemnation proceeding is not dispositive of the issue but that a more involved analysis of the entire transaction is called for. There are fifteen decisions in Kentucky involving the precise point herein. In all but three of these cases it was held that when property is acquired by condemnation the interest acquired is *not* a fee simple absolute, but a lesser interest. The three contrary cases are easily distinguishable. All fifteen cases were treated in the briefs submitted by petitioner before the Court of Appeals. The trial court had referred to only two cases. (*Craddock v. U. of Louisville,* supra, and *Binder v. Board,* supra). The United States in its brief before the Court of Appeals referred to the same two cases. The Court of Appeals, as indicated above, referred to the *Craddock* and *Binder* cases and also referred to *Kentucky Electric v. Wells,* supra.

Those three cases are, of course, the three cases that are distinguishable and run contrary to the general rule established by the twelve Kentucky cases.

Those twelve Kentucky cases, not dealt with by the Court of Appeals, are as follows:

Lexington, 4 P. Turnpike Road Co. v. McMurtry, 42 Ky. 516 (1843);

Kelly v. Donahue, 59 Ky. 482 (1859);

Morris v. Schollsville Branch Red River Turnpike Road, 69 Ky. 671 (1869);

Cynthiana R. C. Turnpike Co. v. Hutchinson, 60 S.W. 378 (1901);
Halley v. Scott County Fiscal Court, 78 S.W. 149 (1904);
Dickerson v. Goocoy, 159 S.W. 539 (1913);
Keown v. Brandon, 266 S.W. 889 (1924);
Kentucky-W. Va. Gas Co. v. Hayes, 37 S.W. 2d 17 (1931);
Mammoth Cave Natl. Park Assn. v. State Highway Commission, 88 S.W.2d 931 (1935);
Sherman v. Petroleum Exploration, 132 S.W. 2d 768 (1939);
Rose v. Bryant, 251 S.W.2d 860 (1952);
McGee v. Williamstown, 308 S.W.2d 795 (1957).

The most recent pronouncement of the Kentucky Court of Appeals on the point involved herein, is *McGee v. Williamstown,* supra. The Court stated, at page 798:

> "There is likewise no merit in the argument that the city obtained a fee simple title to appellant's acreage, although the conveyance to the city indicates this character of title was deeded to it. *It is a well-settled rule of law in this state that a deed executed pursuant to a condemnation proceeding ordinarily conveys an easement in the condemned property. Rose v. Bryant,* 251 S.W.2d 860. Even where the deed purports to convey a fee, the words of the deed are not controlling and the grantee may hold the property only as long as it is devoted to the purposes for which

> it was acquired. It is clear from the case law of this jurisdiction that upon the abandoning of an easement, the land will revert to the grantor or his heirs at law or his successors." *Mammoth Cave Natl. Park Assn. v. State Highway Commission,* 88 S.W.2d 931. (Emphasis added.)

It should be noted that in both *Mammoth Cave Natl. Park Assn.* and *McGee* a fee simple was said to have been conveyed. The Court held that the fact that the right acquired was designated as a fee is not controlling.

In each of the above twelve cases, the Court of Appeals of Kentucky found that the interest acquired by condemnation is only an easement or a fee simple determinable and not a fee simple absolute. These cases involved a turnpike road, a quarry, a toll house, a railroad right of way, a gas line, a telephone line, and a reservoir. There are no Kentucky cases involving a temporary military camp, but such a camp, temporary in nature, built for the war duration only, is much less permanent than a road, quarry, toll house, railroad, gas line, telephone line or reservoir.

The cases cited by the Court as representing Kentucky law, do not in fact represent Kentucky law and the cases are easily distinguishable. The *Binder* case and the *Craddock* case are both school cases. School cases have historically been distinguished by the Kentucky courts because the Kentucky legislature specifically provided that on abandonment of property condemned for school purposes, the local school

board has authority to sell the property and use the proceeds to purchase other property for school purposes. This statutory provision clearly implies that in a school condemnation the condemning authority takes a fee simple absolute.

Kentucky Elec. Development Co.'s Receiver v. Wells, supra, is also distinguishable. That case involved a situation where there was adverse possession by the taker for over 100 years and no privity of title was present in the plaintiff. For those reasons that case cannot be considered to be a valid precedent.

The Kentucky cases, including those cited above, make it absolutely clear that when the use of a fee simple determinable or an easement is abandoned, the land automatically reverts to the grantor. *Cynthiana R. C. Turnpike Co. v. Hutchinson,* supra; *Halley v. Scott County Fiscal Court,* supra; *Mammoth Cave Natl. Park Assn. v. State Highway Commission,* supra; *Rose v. Bryant,* supra; *McGee v. Williamstown,* supra.

The fourth question is whether under Kentucky law the United States acquired the mineral rights along with the surface rights in the federal condemnation action.

The conveyances from the former landowners to the United States contained reservations and exceptions of all coal and mineral rights underlying said land. The deeds stated that:

> "This conveyance made subject to all oil and gas leases of record that are still in force, also except

all coal and mineral rights heretofore conveyed, if any."

It is a well settled principle of law in the state of Kentucky that such an exception or reservation of minerals in a grant or deed is effective to exclude from them the conveyances even though the minerals have not been previously sold or leased: *Bolen v. Casebolt,* 66 S.W.2d 19; *Gibson v. Sellers,* 252 S.W.2d 911; *Bartley v. Rowe,* supra.

It is stated in 23 Am.Jur.2d, Deeds, Section 264:

"An exception of a specific part of the subject matter of the grant is effectual to exclude it from the grant notwithstanding an untrue circumstance is recited in relation to the accepted part. Thus, where the grantor 'reserved', that is excepted, numbered lots from his grant as 'sold', it has been held that all the lots were excepted although some had not been sold. Similarly, the validity of an exception of minerals and mineral rights previously conveyed is in no way dependent on the validity of the prior instrument as a conveyance."

Thus, it can be seen that the United States did not acquire an interest in and to the oil, gas or other minerals underlying the land of Camp Breckenridge, Kentucky.

See also 36 A.L.R.2d 1424 and 6 A.L.R.3rd 297, 300.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MELVIN M. BELLI,

Attorney for Petitioner.

Of Counsel:

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(Appendices A, B and C Follow)

Appendix A

No. 16,926

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Cyrus Higginson, On Behalf of Himself and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky,

Plaintiff-Appellant,

vs.

The United States of America,

Defendant-Appellee.

Appeal from the United States District Court, Western District of Kentucky, Owensboro Division.

Decided September 28, 1967.

OPINION

Before: Edwards, Celebrezze and Peck, Circuit Judges.

Per Curiam. During and immediately after World War II the government established a United States Army Garrison at Morganfield, Kentucky, known as

Camp Breckenridge. For this purpose it assembled some 36-thousand acres of land through eminent domain proceedings in the United States District Court for the Western District of Kentucky, Owensboro Division. In the condemnation actions Declarations of Taking were filed by Henry L. Stimson, Secretary of War of the United States, in which it was stated that "the said lands are necessary adequately to provide for the establishment of a triangular division camp," and that, "the estate taken for said public uses is the full fee simple title thereto, subject, however, to existing easement for public utilities, for railroads and pipelines."

Following World War II, Camp Breckenridge was placed in inactive status and has so remained since 1953. Plaintiff-appellant, on behalf of himself and all other former owners, or heirs, successors or assigns thereof, of the land involved brought this action to require a reconveyance of the property and to recover damages.

Following a period of considerable procedural history, the District Court ultimately entered an order sustaining a motion by the defendant-appellee (hereinafter usually referred to as the "government") to dismiss the action, and this appeal resulted. In addition to those hereinabove set forth, the following facts (which must for present purposes be taken as ture) are alleged in the third amended complaint.*

*A determination of the factual allegations is rendered difficult by reason of the fact that the Third Amended Complaint is not an entire document within its four corners. It contains a statement

Plaintiff thus establishes that the 36,000 acres of land which he and those on whose behalf the action was instituted formerly owned was acquired by the government in the eminent domain proceedings for approximately $3,600,000. After the cessation of use of Camp Breckenridge for military purposes the government offered the mineral rights of the subject property for sale. Offers to purchase those rights were received in an amount exceeding $32,000,000, from which "it is evident that the United States by the selling of the mineral rights in said property will realize a profit of approximately Thirty Million Dollars ($30,000,000.00)" That statement appears in the Amended Complaint, the prayer of which seeks, inter alia, liquidated damages in the amount of $64,000,000. It is the plaintiff-appellant's contention that at the time of their conveyance of their properties, and as a part of the consideration therefor, the then owners were informed by government agents and employees that they would have the right and opportunity to repurchase their lands, since the government was acquiring the property solely for the purpose of constructing and maintaining "a temporary camp for military purposes during the period of national emergency." The government having occupied the

---

adopting "all allegations contained in the original and prior amended complaints, to the same extent as set forth herein, which are not inconsistent with the allegations contained herein, . . ." Thus in order to determine what facts were before the District Court it is necessary to not only study the complaint in its four forms but also to determine which allegations are voided by subsequent assertions. Further complications are encountered by reason of the additional incorporation by reference of extensive Exhibits to the Complaint, Second Amended Complaint and Third Amended Complaint.

property only for the purpose of such a temporary camp, plaintiff contends generally that acquisition of rights greater than were necessary for that limited purpose constituted a taking of the property without due process of law and without payment of just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution. He complains that they were denied the right to prove the value of the mineral rights at the time of the condemnation proceedings, and specifically claims that the government's acquirement of those rights constituted a taking without payment.

The first count of the complaint in its final form prays that the government be directed to sell the subject property to plaintiffs in accordance with the terms of section 23(d) of the Surplus Property Act of 1944 (58 Stat. 777). However, that statute was repealed by section 502 of the Federal Property and Administrative Services Act of 1949 (63 Stat. 399), 13 years before Camp Breckenridge was declared surplus and 16 years prior to commencement of this action. Obviously no right could accrue to plaintiff thereunder. The prayer of the second count is for judgment under 28 U.S.C. § 1346(a)(2) (1964) in the sum of $9,300 as "reasonable rental" for the property for the period of occupancy by the government for the period subsequent to the cessation of its use thereof for the purpose of the taking, i.e., military purposes.

Appellant asserts that Kentucky law should govern the title acquired by the United States government

and that under Kentucky law, since the government did not need fee simple title, it should be held to have acquired this site subject to reversionary rights in the former owners when it became surplus.

The first problem with appellant's argument is that we believe that the nature of title taken by federal condemnation under a federal condemnation statute is subject to determination by federal law unless Congress states otherwise. *United States v. 93,970 Acres,* 360 U.S. 328, 332-33 & n. 7 (1959); *United States v. Miller,* 317 U.S. 369, 379-80 (1943); *United States v. Certain Interests,* 271 F.2d 379, 384 (7th Cir. 1959).

The government's title to the land acquired by negotiated purchases vested some 20-30 years ago. This title cannot now be disputed under any accepted property theory. See *Beistline v. San Diego,* 256 F.2d 421 (9th Cir.), *cert. denied,* 358 U.S. 865 (1958).

The government obtained the bulk of the land comprising Camp Breckenridge by condemnation under the authority of 50 U.S.C. § 171. As part of the condemnation proceedings Declarations of Taking were filed pursuant to 40 U.S.C. § 258(a). This statute provides in part:

> "Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed

> to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein. . . ."

In light of the language of § 258(a), if anything less than a fee simple absolute is taken, the lesser title or exceptions to fee title must be designated in the declaration. *Burkhart v. United States,* 227 F.2d 659, 661-62 & n. 2 (9th Cir. 1955). In the instant case the declarations provided that "The estate taken for said public uses is in full fee simple title, subject however to existing easements for public utilities, for public railroads, and for pipelines." Thus, if valid title passed to the United States, it received full fee title except for the specified easements.

Title to land obtained by condemnation vests upon the filing of the declaration of taking. 40 U.S.C. § 258 (a), *supra.* This title, however, is subject to a right of the former land owner to challenge the taking as not being for the prescribed statutory purpose. *Catlin v. United States,* 324 U.S. 229, 240-43 (1944). This problem is not in issue in the instant case because Camp Breckenridge was erected in accordance with the prescribed military purpose. Consequently, valid title passed to the United States when the declaration of taking was filed.

The subsequent abandonment of Camp Breckenridge did not affect the validity of the government's title to the land acquired by condemnation. A subse-

quent abandonment of the original purpose for which land was acquired does not affect the validity of the condemnation. The validity of title is determined by the conditions existing at the time of the taking. Also, title to property which is vested in the United States government cannot be returned to the original land owners without Congressional authorization. *United States v. Three Parcels of Land,* 224 F. Supp. 873 (D. Alaska 1963); *United States v. 10.47 Acres of Land,* 218 F. Supp. 730 (D. N. Hamp. 1962).

If we were to assume that Kentucky law applied in the instant case, it would still appear that fee simple title was obtained by the United States government. The circumstances surrounding the condemnation transactions indicated an intention and purpose to transfer a fee simple title, subject only to certain specified easements. First, the declaration of taking clearly provided for fee simple title. Second, many years passed after Camp Breckenridge was abandoned as a military base without a claim against the government's title. Such claims were initiated only after oil was found on the property. Finally, under Kentucky law, the particular statute authorizing the condemnation is important in determining the title acquired. Craddock v. U. of Louisville, 303 S.W.2d 548 (1957); *Kentucky Elec. v. Wells,* 75 S.W.2d 1088 (1934); *Binder v. Board,* 5 S.W.2d 903 (1928). The applicable federal statutes authorized a fee simple taking in the instant case. 50 U.S.C. § 171 provides:

> "The Secretary of the Army may cause proceedings to be instituted in the name of the United

> States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: Provided, That when the owner of such land, interest, or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of the Army shall be reasonable, he may purchase or enter into a contract for the use of the same at such price without further delay. . . ."

This language is certainly broad enough to permit a taking in fee simple. Furthermore, § 258(a) of 40 U.S.C., *supra,* an ancillary statute which was used to implement § 171, specifically provides for a taking in fee simple. Our conclusion that the government acquired the fee makes it unnecessary, of course, to consider plaintiff's claim for "reasonable rental" for occupancy subsequent to the use for military purposes.

We will not deal at length with appellee's added contention that the claim of appeal in this case was defective. The mistake was such as could have been

made by a clerk or stenographer. Appellee concedes that the error affected no substantial rights. It misled no one. We believe that good authority supports a liberal interpretation of Federal Rule 73(b). Fed. R. Civ. P. 61; see also 28 U.S.C. § 2111 (1964); Foman v. Davis, 371 U.S. 178 (1962); *Moore, Federal Practice* ¶ 73.14, at 3,216-22 (1966).

Affirmed.

PECK, Circuit Judge, concurring.

I am in entire accord with everything that is contained in the per curiam opinion with the exception of its concluding paragraph. I do not feel that a concession by one party can vest this court with the jurisdiction to hear an appeal any more than parties to an action can by stipulation and waiver create a case for District Court determination where jurisdictional prerequisites are lacking. Thus while joining in the conclusion that plaintiff-appellant's case would fail on the merits for the reason that the government acquired fee simple title to the subject property, I express the view that that issue is not before the court on this record.

During the early days of this case a rather complex and protracted series of pretrial procedures and submission of motions resulted in the filing of an amended complaint and of a second amended complaint prior to August 3, 1965. On that date, after reciting the hearing on and consideration of the Government's motion to dismiss the action, the District Court entered an order providing as follows:

> "IT IS ORDERED that the Government's motion to dismiss is sustained, and the United States Attorney shall tender Findings of Fact and Conclusions of Law in support of this order of dismissal and in conformance with the oral opinion of the Court."

On August 12, 1965 plaintiff filed his motion for leave to file a third amended complaint and on August 12 he filed a motion for new trial obviously directed to the August 3rd entry of dismissal, although it is erroneously referred to in the order as having been entered "on the 2nd day of August, 1965." On September 9, 1965, the District Court entered its further order wherein it is stated:

> "IT IS HEREBY ORDERED that the Third Amended Complaint that was tendered by the plaintiff is filed as of July 30, 1965, and that the defendant's Motion to Dismiss is filed as of July 30, 1965. The plaintiffs' Motion for New Trial is hereby overruled.
>
> "The Order of this Court on August 2, 1965, insofar as it directed the United States Attorney to tender findings of fact and conclusions of law, is set aside and Findings of Fact and Conclusions of Law are not required to be tendered to the Court since matters outside the pleadings were not considered by the Court."

On the 6th day of October, 1965, plaintiff-appellant filed his notice of appeal, wherein the two orders above quoted (and no others) are set forth exactly as they here appear. That the Notice of Appeal applies only and exclusively to these two orders cannot be

questioned, and had no further action been taken by the District Court no doubt would exist as to the necessity of dismissing the appeal on jurisdictional grounds. This is true because the August 3rd order is on its face and in the circumstances of an interlocutory nature and therefore not appealable. Even if this were not true, the filing of the motion for a new trial and for leave to file the third amended complaint would have suspended the finality of the order (Rule 73(a), Fed. R. Civ. P.: *United States v. Crescent Amusement Co.,* 323 U.S. 173, 177 (1944)). If the order was final, these motions were, in effect, timely motions under Rule 59, Federal Rules of Civil Procedure, to alter or amend judgment *(Pierre v. Jordan,* 333 F.2d 951, 955 (9th Cir. 1964)), and the granting of the motion to file the third amended complaint revived the action. Thus neither of the two orders set forth in the Notice of Appeal was as of the date of its filing a final order from which an appeal could be perfected.

The filing of the September 9, 1965, order hereinabove referred to was not, however, the final action of the District Court. Later on that same day (as is apparent from a reading of the two documents), the Court entered a second order which, after four pages of discussion and citation of authority, concludes with this language:

> "Based upon the foregoing, it is apparent that plaintiffs have failed to state a claim upon which relief can be granted and that the Complaint, Amended Complaint, Second Amended Complaint, and Third Amended Complaint are hereby dis-

missed, and the defendant shall recover its costs herein expended."

This latter order being clearly a final and appealable order (*U. S. v. Frank B. Killian Co.*, 269 F.2d 491 (6th Cir. 1959)), the question presented is whether on the present state of the record an appeal from that order has been perfected in such manner as to make it reviewable by this court.

In language not affected by amendment in 1966, Rule 73(b) provided, "The notice of appeal shall specify the parties taking the appeal; *shall designate the judgment or part thereof appealed from;* and shall name the court to which the appeal is taken." (Emphasis supplied.) In language which has been altered in form but not in substance by the 1966 amendment, former Rule 73(a) then provided, "A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take *any of the further* steps to secure the review of the judgment appealed from does not affect the validity of the appeal, . . ." (Emphasis supplied.) Reading these two provisions in *pari materia* makes it apparent that the court to which appeal is attempted to be taken is without jurisdiction unless within the specified period a notice of appeal is filed which, among other things, designates "the judgment or part thereof appealed from." In response to appellee's contention that because no proper notice of appeal was filed this court lacks jurisdiction, appellant in essence responds only that appellee was not prejudiced by the fact that he "inadvertently referred to the wrong

order . . . especially in the light of the fact that the final order from the District Court appeared as part of appellant's opening brief." (Reply Brief.) The latter observation scarcely requires comment; if a jurisdictional defect existed, it could not be cured by a recitation in a brief.

The thrust of appellant's argument on this point centers upon a statement contained in appellee's brief which, with its footnote, reads:

> "The Government must further candidly state that the only inconvenience to it because the notice of appeal was from the second, rather than the third, amended complaint is the difficulty of ascertaining whether appellant chooses to stand on his second or third complaint. [Footnote:] Appellant apparently intends to stand on his third amended complaint, as this is the one used in his statement (Br. 6-8)."

However, the accuracy or the adequacy of an appellee's understanding as to the pertinent facts of an attempted appeal is not the criterion upon which the validity of a notice of appeal is to be determined. The Rule does not state that an appeal is perfected if the appellee learns of "the judgment or part thereof appealed from" by a reading of appellant's brief, by reading an account in the daily press, by hearing of it on a street corner, or by some other means *de hors* the record. It is no response to a Statute of Limitations defense to contend that a defendant extraneously came into possession of all pertinent information the day before the Statute ran even though the complaint was filed the day after, and the unequivocal

language of the Rule above quoted establishes a similar clear and concise requirement. Satisfaction of that requirement, i.e., specifying the judgment or parts thereof appealed from, is a jurisdictional requisite to appeal to this court.

Appellant points to the trend in recent decisions toward liberality in the interpretation of rules relating to timeliness and efficacy of notices of appeal, and this court recognizes that trend, as did the appellee in its brief. However, adopting a liberal interpretation of a statute (or of a rule) is one thing, and completely nullifying its obvious intent by judicial fiat is quite another. In the present situation, appellant is not simply requesting liberality in construction of Rule 73, but is blandly asking that this court ignore the existence of the cited provisions.

Appellant cites only one authority in this regard, *Foman v. Davis,* 371 U.S. 178 (1962). While isolated quotations from *Foman* appear to support appellant's position, that case is readily distinguishable upon its facts. There the appellant filed two notices of appeal within thirty days of two orders of the District Court, and the Court of Appeals of its own accord held the first notice to have been premature because filed during the pendency of motions to vacate and amend, and therefore of no effect, and further held the second notice of appeal ineffective for failure to specify that the appeal was being taken from that judgment as well as from the orders denying the motions. The Supreme Court held that, "With both notices of appeal before it (even granting the asserted ineffective-

ness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated." (p. 229.) No such situation existed in the present case, and the precise quotation of two inappropriate orders and the total omission of the critical third can scarcely be characterized as being merely "inept." Similarly, we recognize and are totally in accord with the portion of *Foman* opining that it is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities," but in contradistinction reiterate that we are here dealing with a jurisdictional requirement.

In addition to *Foman,* the liberal trend mentioned earlier has found expression in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215 (1962); in *Thompson v. Immigration & Naturalization Service,* 375 U.S. 384 (1964); and in *Wolfsohn v. Hankin,* 376 U.S. 203 (1964). Each of these cases, however, presented a circumstance favorable to the plaintiff-appellant and without counterpart in the present case. In *Harris,* it was stated (p. 217) that "the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion Judge's ruling," where the latter had granted an extension of time within which to file a notice of appeal, and within which such filing was made. It is to be noted that appellant there relied on the action of the District Court in

granting the extension, even though it was later held unwarranted since no "excusable neglect" was shown. (Fed. R. Civ. P., 73(a)). In a five-to-four decision in *Thompson* the majority held the cause to "fit squarely within the letter and spirit of *Harris,*" and in circumstances again found to be "unique" found the existence of appellate jurisdiction. *Wolfsohn,* another five-to-four decision, is an eight-line per curiam granting certiorari and reversing on the basis of *Harris* and *Thompson.* However, in a significant dissenting opinion in which he was joined by Justices Harlan, Stewart and White, Justice Clark stated (p. 203):

> "I have concluded that Harris Truck Lines v. Cherry Meat Packers should be confined to its peculiar facts, i.e., a finding of 'excusable neglect' under Rule 73(a) of the Federal Rules of Civil Procedure. I say this, although I joined Harris, because the Court has used Harris to spawn the present hopeless confusion which I never contemplated at the time of its decision. Harris was the authority upon which the court rested Thompson v. Immigration & Naturalization Service, despite the fact that Thompson involved Rules 52(b) and 59(b) and (e) with their specific requirements that the motion must be made or served not later than ten days after the entry of judgment. The Court brushed aside these express and unambiguous mandates of Congress with the assertion that Thompson 'fits squarely within the letter and spirit of Harris.' And now comes a third case . . . which further compounds the subversion of the rules. . . ." (Citations omitted.)

Although this expression reflects only the position of a minority of the Court so far as *Wolfsohn* is concerned, it seems fair to conclude that the Court does not seem presently disposed to extend the so-called liberal trend beyond cases presenting "unique circumstances," and in which reliance, mistaken or otherwise, was placed on prior judicial action by appellant. No such situation here exists, nor does any other circumstance justifying our disregarding what Justice Clark has so accurately termed "express unambiguous mandates."

For the reasons herein indicated, I would dismiss this appeal on the ground that it was not taken from a final judgment.

Filed September 28, 1967,
Carl W. Reuss, Clerk.

Appendix B

United States District Court for the Western District of Kentucky, Owensboro Division
Civil Action No. 2074

Cyrus Higginson, On Behalf of Himself and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty Six Thousand Acres, Namely Camp Breckinridge, in Union Henderson, and Webster Counties, Kentucky,

Plaintiffs,

vs.

The United States of America,

Defendant.

Opinion

The action instituted by the plaintiffs involves land at Camp Breckinridge, Kentucky, that was condemned by the United States in 1942, 1943 and 1944. The actions condemning this land were filed in the United States District Court, Western District of Kentucky, Owensboro Division. The Declarations of Taking, which are designated as Exhibits A, B, C, D, and E of the plaintiffs' complaint, were filed in Civil Actions Nos. 74, 77, 81, 88, and 134 at Owensboro. Each of the Declarations of Taking provided in paragraph 3 that:

"The estate taken for said public uses is in full fee simple title, subject however to existing easements for public utilities, for public railroads, and for pipe lines." (Italics ours)

Plaintiffs have filed four complaints. The United States moved to dismiss the complaints on the grounds that the complaint and amended complaints failed to state a claim upon which relief could be granted, and that the Court lacks jurisdiction of the subject matter and the parties. The Third Amended Complaint was the last which was filed by the plaintiffs, and the same motion to dismiss was renewed by the United States.

The plaintiff bases jurisdiction as to the first count of the third amended complaint on Title 28, Section 1331(a), U.S.C. The relief demanded in this count is that the Court direct the United States to sell the mineral rights to the plaintiff in accordance with the Surplus Property Act of 1944. It is at once apparent that this is a suit against the United States to which it has not consented. Furthermore, affirmative relief is demanded against the United States. This Court lacks jurisdiction to grant an injunction against the United States. Section 1331 of Title 28, USC, upon which the plaintiffs have asserted jurisdiction is not a consent statute and since the United States has not consented to suit, the cause of action set forth in Count I must fail. *Anderson v. United States,* 229 F. 2d 675; *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 703; *United States v. Associated Air Transport, Inc.,* 256 F.2d 857 (5th).

Plaintiffs are contending that they have a vested interest by virtue of the Surplus Property Act of 1944 and this right was reserved to them by Title I, U.S.C., Section 109. Plaintiffs further contend that employees of the United States, at the time this acreage was taken, told the plaintiffs and others they would have the right to repurchase the lands in question, and that this constitutes part of the consideration for the acquisition of said lands. Section 38 of the Surplus Property Act of 1944 fixes the expiration date of the statute at the end of three years following the date of cessation of hostilities of World War 2. This Act expired on December 31, 1946. This Act was also repealed by the Federal Property and Administrative Services Act of 1949, 1963, Statutes 377, 399, under Section 502(a).

The case of *Mason v. United States,* U.S. Court of *Claims* 169, F, Supp. 507, involved a similar action regarding Fort Knox. The Court in that case held that the plaintiffs did not have any rights under the Surplus Property Act, and further that Section 109 of Title I, U.S.C.(a), did not vest any repurchase rights in the plaintiffs, since the action was commenced after the Statute was repealed. The representations allegedly made by the Government agents during the acquisition of land for Fort Knox were likewise disposed of in the case of *Mason v. United States,* supra, and *Harrison v. Phillips,* 185 F. Supp. 204 (SD, Texas), affirmed per curiam 289 F. 2d 927 (5th), *cert. denied,* 368 U.S. 835. The *Mason* case, supra, held that plaintiffs could not vary by evidence of

alleged parol statements by Government agents judicial records and deeds which showed the United States acquired fee simple title. In *Harrison,* supra, in denying plaintiffs' claims it was held that any statements "made by the negotiators were clearly beyond the scope of their authority and not binding upon the Government."

Plaintiffs are further contending that they were denied the right to prove at the time of condemnation proceedings the value of mineral rights under said properties. The plaintiffs did not appeal from the judgments entered in these condemnation actions at Owensboro, Kentucky. Since the United States acquired a full fee simple title, the plaintiffs should have appealed from those judgments if they thought there was any error. They cannot now collaterally attack these judgments which were entered some twenty years ago. The Declarations of Taking, mentioned above, state that the United States is taking "full fee simple title", which includes any and all interests in the land taken. The petitions and judgments are to the same effect. This Court will take judicial knowledge of its own records which show that fee simple title was taken by the United States.

Based upon the above-cited authorities, plaintiffs have failed to state a claim for relief under Count I.

Under Count II the plaintiffs are asserting jurisdiction under Title 28, U.S.C., Section 1346(a)(2), which is otherwise known as the Tucker Act. The plaintiffs' contention is simply that the United States,

under the Declaration of Taking, could only take the land for the purpose of establishing a triangular division camp in furtherance of the National War Program. When the United States ceased to use Camp Breckinridge for this purpose, title reverted to the plaintiffs and the plaintiffs are entitled to compensation from the time the Government ceased to use Camp Breckinridge as a triangular military camp to date. Plaintiffs are asking money judgment in the sum of $9,300.00.

The Declarations of Taking referred to above show unequivocably that the United States acquired the full fee simple title to this property. There is no ambiguity whatsoever in the estate taken by the Secretary of War. It has been held without exception that the laws of the State cannot limit the inherent power of the United States to condemn lands in fee simple for a public purpose. See *United States v. Certain Parcels of Land in Williams County,* 178 F.Supp. 313 (D, Md, 1960); *Town of Durham, N.H. v. United States,* 167 F. Supp 436 (Dist. N.H. 1959).

The law of Kentucky also holds that this taking is in fee simple. See *Binder v. Board of Education,* Ky. 5 SW, 2d 902; *Craddock v. University of Louisville,* Ky. 303 SW, 2d 548.

Based upon the foregoing, it is apparent that the plaintiffs have failed to state a claim upon which relief can be granted and that the Complaint, Amended Complaint, Second Amended Complaint, and Third Amended Complaint are hereby dismissed,

and the defendant shall recover its costs herein expended.

September 7, 1965

/s/ Henry L. Brooks
Henry L. Brooks
United States District Judge

A Copy: Attest
Martin R. Glenn, Clerk

By Geneva Bellxz xz
Deputy Clerk

Appendix C

United States Court of Appeals
For the Sixth Circuit
No. 16,926

Cyrus Higginson, On Behalf of Himself and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky,

Plaintiff-Appellant,

vs.

The United States of America,

Defendant-Appellee.

Before: Edwards, Celebrezze and Peck, Circuit Judges.

JUDGMENT

Appeal from the United States District Court for the Western District of Kentucky.

This Cause came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.
Carl W. Reuss
Clerk

FILED SEP 28 1967
Carl W. Reuss, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 948

CYRUS HIGGINSON, ON BEHALF OF HIMSELF AND ALL OTHER FORMER LANDOWNERS, OR HEIRS, SUCCESSORS AND ASSIGNS THEREOF, OF 36,000 ACRES, NAMELY CAMP BRECKINRIDGE, IN UNION, HENDERSON, AND WEBSTER COUNTIES, KENTUCKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit as a class action on behalf of himself and all others whose lands had been condemned during World War II for use as part of Camp Breckinridge, Kentucky. In the condemnation actions, the complaints and declarations of taking provided that "the estate taken for said public uses is the full fee simple title thereto, subject, however, to existing easement for public utilities, for railroads and pipelines" (Pet. App. ii).[1] Camp Breckinridge

[1] In a few instances, the United States acquired these lands subject to outstanding oil and gas leases, but those interests were later condemned.

288-538—68

was placed on an inactive status in 1953 and so remained at the time this action was initiated (Pet. App. ii).[2]

Petitioner's complaint sought recovery for the rental value of the property subsequent to 1953 on the ground that under Kentucky law the title which the United States acquired in the condemnation proceedings was subject to reversionary rights in the former owners when the property ceased to be used for military purposes. The district court granted the Government's motion to dismiss the complaint for failure to state a claim upon which relief can be granted (Pet. App. B). The court of appeals affirmed, holding that the nature of title taken under the federal power of eminent domain is determined by federal law, rather than the law of the state where the lands are located (384 F. 2d 504, Pet. App. A).[3]

The decision of the court below is correct and is not in conflict with the decisions of any other courts of appeals. There is no occasion for further review by this Court.

---

[2] The lands were ultimately declared surplus to the needs of the Government and were sold, subsequently to the bringing of this action, for a price greatly in excess of their acquisition costs.

[3] Petitioner's complaint also sought an order directing the Government to resell the lands to their former owners pursuant to Section 23(d) of the Surplus Property Act of 1944, 58 Stat. 777, 50 U.S.C. App. (1946 ed.) 1632. The court below held that petitioner's rights under Section 23(d) were extinguished by its repeal by Section 502 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 399. Petitioner does not contest that ruling in this Court.

In the declarations of taking the United States clearly specified its intention to take "full fee simple title" to the lands, with no reversion to the former owners. The nature of the title acquired under these circumstances is controlled by federal law, *United States* v. *93.970 Acres,* 360 U.S. 328, 332–333; *United States* v. *Miller,* 317 U.S. 369, 379–380; *Kohl* v. *United States,* 91 U.S. 367, 374, and petitioner does not contend that the alleged reversionary interest is founded upon federal law.

None of the cases relied on by petitioner are in conflict with the decision of the court below. Four of the five cases cited merely hold that state law determines the nature of the interest which the condemnee owns in the condemned property. *United States* v. *Certain Property in the Borough of Manhattan,* 306 F. 2d 439 (C.A. 2); *Carmichall* v. *United States,* 273 F. 2d 392 (C.A. 5); *United States* v. *19.86 Acres in East St. Louis,* 141 F. 2d 344 (C.A. 7); *United States* v. *Becktold Co.,* 129 F. 2d 473 (C.A. 8). In these cases, the question was whether certain properties were fixtures which were condemned as part of the real property or were personal property excluded from the taking. None of them holds that the nature of the title described in the condemnation proceeding as acquired by the United States is determined with reference to local law.

The fifth case relied on by petitioner arose from a conveyance of land to the United States by deed and the reservation by the grantor of a mineral servitude which was peculiar to Louisiana law. *Leiter Minerals, Inc.* v. *United States,* 329 F. 2d 85 (C.A. 5). The

decision of the Fifth Circuit was subsequently vacated by this Court with directions to dismiss the cause as moot. *United States* v. *Leiter Minerals, Inc.*, 381 U.S. 413. This dismissal for mootness prevented that case "from spawning any legal consequences." *United States* v. *Munsingwear*, 340 U.S. 36, 41.

Contrary to petitioner's assertion, the circuits are in agreement on the proposition that federal law controls federal condemnation proceedings, including the nature of the estate acquired therein. See, *e.g.*, *United States* v. *Certain Property in the Borough of Manhattan*, 344 F. 2d 142, 144 (C.A. 2); *United States* v. *Pinson*, 331 F. 2d 759, 760 (C.A. 5); *Bumpus* v. *United States*, 325 F. 2d 264, 266 (C.A. 10); *United States* v. *Sixteen Parcels* (*St. Louis, Missouri*), 281 F. 2d 271, 274 (C.A. 8); *United States* v. *Certain Interests in Property* (*Champaign County, Ill.*), 271 F. 2d 379, 384 (C.A. 7); *United States* v. *State of South Dakota*, 212 F. 2d 14 (C.A. 8).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant Attorney General.
S. BILLINGSLEY HILL,
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Attorneys.

JANUARY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

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SUPREME COURT, U. S.

FILED
MAY 13 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 948.

CYRUS HIGGINSON, on Behalf of Himself, and All Other Former Landowners, or Heirs, Successors and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MOTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 948.

CYRUS HIGGINSON, on Behalf of Himself, and All Other Former Landowners, or Heirs, Successors and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MOTION FOR LEAVE TO FILE OUT-OF-TIME PETITION FOR REHEARING.

Comes Now the Petitioner, Cyrus Higginson, on behalf of himself and all other former landowners, or heirs, successors and assigns thereof, of thirty-six thousand (36,000) acres, namely Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky, and respectfully requests this Court to grant him rehearing on his Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review its Judgment affirming the United States District Court for the Western

District of Kentucky, Owensboro Division, which District Court purportedly entered an Order sustaining a Motion by the Defendant-Respondent (hereinafter usually referred to as the Government) to dismiss Petitioner's cause of action.

The Petitioner further moves the Court to waive the provisions for finality of litigation as set forth in Rule 58 (4), of this Court's Revised Rules, and prays the Court to apply the Rule herein as established and expressed in **Cahill v. New York, N. H. & H. R. Co.**, 351 U. S. 183, 76 S. Ct. 758, 100 L. ed. 1075 (1956); **United States v. Ohio Power Co.**, 353 U. S. 98, 76 S. Ct. 652, 1 L. ed. 2d 683 (1957); **Gondeck v. Pan American World Airways, Inc.**, 382 U. S. 25, 86 S. Ct. 153, 15 L. ed. 2d 21 (1965).

And upon the granting of this Motion for Leave to File Petition for Rehearing, the Petitioner moves the Court to grant the Petition for Rehearing, to vacate the Order denying Certiorari, to grant the Petition for Certiorari, and to remand this case to the Court of Appeals with directions to vacate its judgment and to remand this cause to the District Court for further proceedings.

ORDER DENYING WRIT OF CERTIORARI.

This Court on March 4, 1968, denied Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. The Court's Memorandum Opinion is reported at 19 L. ed. 2d 1137.

ORDERS EXTENDING TIME, AND MOTIONS FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING.

An Order granting to the Petitioner, an Extension of Time in which to file a Petition for Rehearing, to and to include April 19, 1968, was entered by this Court on March 29, 1968, and appended to the Petition for Rehearing (Pet. Reh. App. A, p. A-1). On April 19, 1968, the Petitioner

filed with this Court an Application requesting an additional extension of time, to and to include April 26, 1968, in which to file his Petition for Rehearing (Pet. Reh. App. B, p. A-2) and on April 25, 1968, counsel for the Petitioner received the Order granting the requested additional extension of time, to and to include April 26, 1968, in which to file a Petition for Rehearing (App. A, p. A-1).

On April 25, 1968, the Petitioner forwarded to this Court, by mailing air mail, special delivery, postage prepaid, an Application requesting an additional extension of time, to and to include May 1, 1968, in which to file a Petition for Rehearing. Counsel for the Petitioner was subsequently advised by the Chief Deputy Clerk of this Court that the said Application was not received until April 29, 1968, which was for an additional extension of time in which to file the Petition for Rehearing, which Petition by virtue of the prior Order, was due on April 26, 1968. The Petition for Rehearing relative to this Motion was received by the Court on April 27, 1968, hence one (1) day too late.

REASONS FOR GRANTING PETITION FOR REHEARING.

For good cause for granting Rehearing herein the Petitioner will show unto the Court:

(1) That there has occurred intervening circumstances of a substantial nature and such as to have a controlling effect.

(2) That there are other substantial grounds available to the Petitioner although not previously presented which are of such importance fundamentally and economically both to Petitioner, and the people of the Commonwealth of Kentucky to unequivocally justify application of the established doctrine that *"the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of the rules of this Court."*

(3) That the Petition for Rehearing, heretofore tendered on April 27, 1968, sets out substantial grounds for granting the Petition for Rehearing and for a Writ of Certiorari.

Facts on Which Petitioner's Motion Is Based.

The facts on which Petitioner's Motion is based will be stated in, as nearly as possible, a chronological arrangement for the convenience of this Court in following the sequence of events leading up to the present standing of the case.

On April 25, 1965, Cyrus Higginson, Petitioner herein, brought a class action under Rule 23 (a) (b) of the Federal Rules of Civil Procedure in the United States District Court for the Western District of Kentucky, Owensboro Division, against the United States of America, on the behalf of himself, and approximately 5,000 other former landowners, of approximately 36,000 acres of land comprising the United States Army Garrison of Camp Breckenridge, Morganfield, Kentucky.

A portion of the land in question was acquired through actions in Condemnation Proceedings filed by the United States of America commencing on February 12, 1942, and ending on July 12, 1948.

1. Intervening Circumstances of a Substantial Nature.

Since the denial of Petitioner's Writ of Certiorari, and the tendering of the Petition for Rehearing additional information or facts have been made known to this counsel which unquestionably constitute intervening circumstances of a substantial nature and such as to have a controlling effect. It is now apparent that the vast majority of the land in question was acquired by the government through voluntary negotiations with the landowners, even though the mass intanglement of records purport other-

wise. *This recent event raises a material question of fact since the voluntary negotiations of contracts between the government and the landowners presents such factual questions which obviously can be resolved only upon the basis of evidence as to the conditions and circumstances surrounding said transactions at the time of their occurrence.*

It is submitted that the foregoing intervening circumstances of recently made known facts represent substantial grounds entitling Petitioner to the relief requested. And even if the Court should deem otherwise, Petitioner still submits that irregardless the aforegoing facts will warrant granting the Petition for Rehearing and for a Writ of Certiorari.

Petitioner's cause embodied an orginial Complaint and three amended complaints which were based upon 8 separate grounds: (1) The landowners' right to repurchase their property under the Surplus Property Act of 1944; (2) An implied contract to recover reasonable rental value of the land used by the government from the time it ceased to use said land for the purposes which it was taken; *(3) The mineral rights were not acquired by the government, by reason of their (the exceptions and) reservations contained in the Deeds;* (4) The property was taken without due process of law, and without payment of just compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution; (5) The government did not acquire a fee simple absolute interest in the property; (6) That fraud and misrepresentation were committed by agents, servants and employees upon which the landowners relied in conveying their land; (7) The land became surplus property under the War Surplus Act, 50 U. S. C. A. 1611, prior to its expiration and repeal, but that the government intentionally, deliberately and arbitrarily withheld said property; *(8) The interest acquired by the government auto-*

matically reverted back to the landowners upon the abandonment and cessation of the use of the land for the acquired purpose.

2. Substantial and Controlling Points Were Left Undecided Below.

The District Court in its Opinion (Pet. Reh. App. F, p. A-11) entered on September 9, 1965, *did not pass upon, or make any findings as to, whether the mineral rights were acquired by the government, and particularly as to how the government could have obtained the mineral rights when a majority of the conveyances specifically excepted and reserved all mineral rights to the landowner.* An example of said reservations and exceptions contained in the Deeds entered into by the landowners and the government through voluntary negotiations is appended to this Motion (App. B, p. A-2).

The grounds mentioned above, and designated as (4), (7) and (8), which contained issues of major and substantial importance in Petitioner's cause were also not passed on or mentioned by the District Court in its Opinion.

The foregoing issues or questions upon which the District Court failed to make a finding were properly presented to the Court of Appeals, where, again, no findings or determinations were made. The Opinion of the Court of Appeals is appended to the Petition for Certiorari (Pet. App. A, pp. i-xvii).

The cause herein has not been irrevocably closed in that no Motion has ever been presented to the District Court to implement the mandates of this Court or of the Court of Appeals.

CONCLUSION.

For the reasons set forth in this Motion, and in the Petition for Rehearing which has been previously tendered to the Court, as well as in the Petition for Certiorari pre-

viously filed, the Petitioner respectfully requests that leave be granted to file the Petition for Rehearing, to vacate the Order denying Certiorari, to grant the Petition for Certiorari, and to remand this case to the Court of Appeals with directions to vacate its Judgment and to remand this cause to the District Court for further proceedings.

Respectfully submitted,

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T. D. EMBERTON,
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BROWN, SLEDD & McCANN.

Certificate of Counsel.

Pursuant to Rule 58, as amended, I hereby certify that the foregoing Motion for Leave to File, and the previously filed Petition for Rehearing, are presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58, as amended.

.....

Jerry W. Nall,
Attorney for Petitioner.

APPENDIX A.

Supreme Court of the United States.

No. 948, October Term, 1967.

Cyrus Higginson, Etc.,
Petitioner,

vs.

United States.

Order.

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for rehearing in the above-captioned case be, and the same is hereby, extended to and including April 26, 1968.

/s/ Potter Stewart,
Associate Justice of the Supreme Court of the United States.

Dated this 19th day of April, 1968.

APPENDIX B.

EXHIBIT "E" TO BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR A NEW TRIAL AND TO AMEND THE JUDGMENT.

Warranty Deed.

This Deed made and entered into this 6th day of March, 1943, between Leslie Tapp, unmarried, and Byron Tapp & Louise Tapp, his wife, parties of the first part, and the United States of America, party of the second part: Witnesseth, that said parties of the first part, for and in consideration of the sum of Two Thousand Five Hundred and no/100 Dollars ($2,500.00), the receipt of which is hereby acknowledged, do hereby sell and convey to party of the second part, its successors and assigns forever, the following described real estate lying in Webster County, Kentucky, viz.:

Beginning at a point in the center of the Highland Creek Ditch, corner to Clarence Tapp; thence with the line of Chester Ramsey and Y. M. Gibson S 37° 45′ W 78 poles to a point in the line of R. L. Higginson; thence with his line S 55° 20′ E 4 poles; thence S 14° 25′ W 132.5 poles; thence with the line of R. L. Higginson and Rose Bridwell and Cates Branch S 68° 30′ E 29 poles to a corner of Robert F. Tapp; thence with his lines and the center of Cates Branch N 05° E 9 poles; thence the following courses with Cates Branch N 39° 06′ W 12 poles; thence N 06° 26′ E 5.5 poles; thence N 88° 26′ E 6 poles; S 52° 05′ E 13 poles; thence N 83° 35′ E 4.5 poles; thence N 46° E 15 poles; thence S 89° 15′ E 10.5 poles; thence N 13° 40′ E 8.5 poles; thence N. 61° 25′ E 6.5 poles; thence N 20° E 8.5 poles; thence S 76° 25′ E 11 poles; thence N 26° E 16 poles; thence S 75° 15′ E 6 poles; thence N 31° 20′ E 5

poles; thence N 02° 55′ W 19.5 poles; thence N 65° 40′ E 6 poles; thence N 28° 20′ E 7 poles to a corner of J. D. Tapp; thence with his lines and the center of Cates Branch the following courses N 07° 20′ W 19 poles; thence N 35° 55′ E 6.5 poles; thence N 12° 40′ W 6 poles; thence N 60° 50′ W 7 poles; thence N 06° 55′ W 9.6 poles; thence N 52° E 10.5 poles; thence N 22° 85′ E 10.5 poles; thence N 10° 36′ W 22 poles to a point in the center of Highland Creek Ditch and Cates Branch, corner to Clarence Tapp; thence with his lines and the center of the Highland Creek Ditch N 51° 20′ W 27 poles; thence N 26° 40′ W 21 poles to the beginning, containing 77.7 acres, more or less.

Leslie Tapp and Byron Tapp, jointly, acquired title to the above described property through the following deed, to-wit: C. D. B. 6, page 47; Deed Book 78, page 312; Deed Book 81, page 587; and Deed Book 78, page 503, all in the Webster County Court Clerk's office.

This conveyance made subject to all oil and gas leases of record that are still in force, also except all coal and mineral rights heretofore conveyed, if any.

The first parties also quit-claim and convey to the second party all of their right, title and interest, if any, in and to any and all of the property adjoining and abutting the above described property.

To Have and to Hold the same with all the appurtenances thereon, to the party of the second part, its successors and assigns forever, with a covenant of "General Warranty."

Witness our hands the day and year above written.

/s/ Byron Tapp.
/s/ Louise Tapp.
/s/ Leslie Tapp.

State of Kentucky, }
County of Henderson. } Sct.

I, Ben M. Strother, a Notary Public in and for the County and State aforesaid, certify that on March 6th, 1943, the foregoing deed was produced before me in my county and acknowledge by Byron Tapp and Louise Tapp, his wife, and Leslie Tapp, unmarried, to be their free act and deed.

Witness my hand this 6th day of March, 1943.

/s/ Ben M. Strother,
Notary Public, Henderson County, Ky.

My commission expires the 3rd day of December 1944.

State of Kentucky, }
County of Webster. } Sct.

I, Susie M. Letzinger, Clerk of the County Court for the County and State aforesaid, do certify that on the 10 day of March, 1943, the foregoing deed was produced to me in my office and lodged for record. Whereupon I have truly recorded the same together with this and preceding certificate in my office.

This 10 day of March, 1943.

/s/ Susie M. Letzinger,
Clerk.
By /s/ Doris Miller,
D. C.

BRIEF AMICUS CURIAE

Office-Supreme Court, U.S.
FILED
MAY 21 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

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CYRUS HIGGINSON, on Behalf of Himself, and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of the Commonwealth of Kentucky as Amicus Curiae.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 948.

CYRUS HIGGINSON, on Behalf of Himself, and All Other Former Landowners, or Heirs, Successors, and Assigns Thereof, of Thirty-Six Thousand Acres, Namely Camp Breckenridge, in Union, Henderson and Webster Counties, Kentucky,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of the Commonwealth of Kentucky as Amicus Curiae.

The Commonwealth of Kentucky, on behalf of Cyrus Higginson, Petitioner herein, and on behalf of approximately 5,000 other former landowners, or heirs, successors and assigns thereof, of 36,000 acres, namely Camp Breckenridge, in Union, Henderson, and Webster Counties, Kentucky, and on further behalf of the citizens of this Commonwealth, files this Brief as Amicus Curiae urging this Court to grant the Petitioner's Petition for Rehear-

ing, to grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, and to grant the relief heretofore requested by the Petitioner in his Motion for Leave to file said Petition for Rehearing.

INTERESTS IN THE AMICUS CURIAE.

The interests of the Commonwealth of Kentucky in the above-styled proceedings can be simply stated.

First, it is the conviction of the Commonwealth of Kentucky that the Petitioner's remedies and procedural steps which were once available to them in order to present their grievances to the Courts have been completely obliterated by the groundless and erroneous decisions dealt to them by the District Court and the Court of Appeals. The erroneous decisions rendered by the Federal District Court and the United States Court of Appeals for the Sixth Circuit (hereinafter sometimes referred to as the lower courts) have deprived the Petitioners of their property without due process in contravention of the Fifth Amendment to the Constitution of the United States.

Secondly, the lower courts have decided an important state or territorial question in such a way as to be in direct conflict with the applicable laws of this State relative to an exception or reservation of minerals from a grant being effective even though an untrue circumstance is recited in relation to, or as the reason for, the excepted interest. If the unqualified decisions rendered by the lower courts are permitted to stand, the entire economical structure and welfare of the Petitioner, the citizens of this Commonwealth, and the mineral industries could be in serious jeopardy.

The Court of Appeals in affirming the District Court's decision, in essence decreed that the Federal Government had obtained a fee simple interest in and to the property

in question, without taking into consideration the undisputable fact that a majority of the land was acquired through voluntary negotiations, which involved the exceptions and reservations of all mineral rights to the landowners. Said exceptions and reservations contained in the deeds read:

> *"This conveyance made subject to all oil and gas leases of record that are still in force, also except all coal and mineral rights heretofore conveyed, if any."* (Emphasis added.)

An example of the General Warranty Deeds from the former landowners to the United States of America containing the above exception and reservation of all coal and mineral rights is appended to this Brief (App. A, p. A-1).

It is a settled rule of law in the Commonwealth of Kentucky, that the above language in a deed or grant creates such an effectual exception or reservation of minerals so as to exclude them from the conveyance even though the minerals have not been previously sold or leased. **Bolen v. Casebolt,** 66 S. W. 2d 19, 252 Ky. 17; **Gibson v. Sellars,** Ky., 252 S. W. 2d 911, 37 ALR 2d 1435; **Bartley v. Rowe,** Ky., 343 S. W. 2d 140; **Brown v. Brown,** Ky., 404 S. W. 2d 286 (1966); **Noffsinger v. Brown,** Ky., 408 S. W. 2d 436 (1966).

There are hundreds of thousands of acres involving minerals in the Commonwealth of Kentucky where the title in and to the minerals is dependent solely upon clauses either identical or similar to the ones contained in the deeds from the Petitioners, and which said clauses under the law of Kentucky are effectual to exclude or retain the minerals. The decisions rendered by the lower courts in the above-styled cause have placed a reflection of uncertainty, in all probability, upon the once clear interpre-

tation of what constituted an exception or reservation of minerals in this State. In other words, the lower courts' decisions have now created confusion, chaos and a questionable cloud upon titles to minerals originating through exceptions and reservations.

The mineral industry constitutes one of the principal sources of commerce and revenue for the Commonwealth of Kentucky and its citizens. In 1964 alone, Kentucky's mineral production was valued at $444,379,000. And in that same year Kentucky ranked second among the states in the production of bituminous coal, ball clay, and fluorspar; fifteenth in the production of oil; fourteenth in the production of natural gas; and the proven recoverable crude oil reserves in Kentucky, as of December 31, 1964, have been estimated at 118 million barrels by the U. S. Bureau of Mines. **Natural Resources of Kentucky**, Kentucky Department of Commerce (1967), pp. B-2, B-8, B-11.

The mineral industry, businessmen planning to invest in land, and the citizens of this State must be reasonably assured that what interest is acquired in real property either purchased, or taken, relative to condemnation proceedings, by the federal government will be that same interest acquired if the property had been instead purchased, or taken, by the State of Kentucky. Persons or industries dealing in land within this State (or, as a practical matter, any other state) must conduct themselves in the light of this State's law covering real property, which law will inevitably govern most of their transactions. Needless to say, any such business will be deterred if they also have to take cognizance of a purported federal property law, and especially the decisions rendered by the lower courts, that would apply only in the uncommon event of a federal condemnation for the purpose of establishing a temporary military training camp during the period of a war emergency.

What is not of record but which is of far greater significance is the circumstance that the opinions of the lower courts, if permitted to stand, will reach into property arrangements, mineral rights, and the ownership of property across all of Kentucky, and said opinions will stand as forceful and compelling precedents for the abrogation of existing exceptions and reservations of minerals, and the unconstitutional impairment of the obligation of contract. Essentially, the once applicable and controlling laws of this Commonwealth which secured the ownership and title to both mineral rights and surface rights has now taken on an uncertain application. This is the real and present hazard which this case presents and which the Commonwealth of Kentucky as Amicus Curiae argues urgently for the issuance of this Court's Writ.

Therefore, in order to protect the mineral industry, and its citizens, the Commonwealth of Kentucky under the provisions of Rule 42 (4), by and through the law officer authorized therefor, pursuant to KRS 11.070 and KRS 12.210 (App. B, p. A-4), does hereby file this Brief as Amicus Curiae in support of the Petitioner, Cyrus Higginson, and on the further behalf of approximately 5,000 other former landowners.

ARGUMENT.

I.

Persons, Industries, and All Other Citizens of This Commonwealth, in Addition to the Petitioners, Will Be Deprived of Their Property Without Due Process and in Contravention of the Fifth Amendment, if the Decisions of the Lower Federal Courts Are Permitted to Stand.

1. The United States Government acquired only the interest in the property in question as was needed for the establishment of a military camp.

The law of Kentucky is well developed on the point herein involved and it clearly indicates that the description in a declaration of taking in a condemnation proceeding is not dispositive of the issue but that a more involved analysis of the entire transaction is called for.

The Federal Government contends that a fee simple title was acquired by the United States in as much as some of the declarations of taking purportedly stated that the estate taken was a full fee simple title. This contention by the Federal Government serves merely to present the questions or issues involved—and not to answer them. This proposition by the amicus curiae is evidenced by the fact, notwithstanding the condemnation proceedings, a vast majority of the land in question was acquired by the United States from the former land owners through the means of General Warranty deeds which specifically excepted and reserved all mineral rights (App. A, p. A-1).

It is unequivocal, under the applicable and controlling law of this Commonwealth, that the exceptions or reservations of all mineral rights as contained in the deeds

from the former land owners were effectual to exclude all minerals from the conveyances even though the minerals had not been previously sold or leased. In the case of Bartley v. Rowe, Ky., 343 S. W. 2d 140, the Kentucky Court of Appeals stated:

> "*. . . The fact that none of the minerals actually had previously been conveyed does not prevent the exception from being effective.*"

The definition of an exception is adequately stated in 23 Am. Jur. 2d, Deeds, Sec. 264:

> "*An exception of a specific part of the subject matter of the grant is effectual to exclude it from the grant notwithstanding an untrue circumstance is recited in relation to the excepted part.* Thus, where the grantor 'reserved', that is, excepted, numbered lots from his grant as 'sold', it has been held that all the lots were excepted although some had not been sold. *Similarly, the validity of an exception of minerals and mineral rights previously conveyed is in no way dependent on the validity of the prior instrument as a conveyance.*" (Emphasis added.)

As demonstrated by the Federal Government's own acts, and by the proper application of the applicable law of this state, it is unquestionable that the United States did not acquire an interest in and to the mineral rights underlying the lands of Camp Breckenridge, Kentucky.

The respondent in a footnote, page 1 of their Memorandum in Opposition, stated that:

> "In a few instances, the United States acquired these lands subject to outstanding oil and gas leases, but those interests were later condemned."

This amicus curiae feels that the Federal Government, by inserting said statement, purposefully attempted to

mislead this Court into the belief that the condemning of these purported leasehold interests had the effect of acquiring the above mentioned mineral rights which had been excepted, reserved and retained by the Petitioners. It would be an absurdity to contend that the condemning of interests in an outstanding oil and gas lease would have the effect of acquiring any interests in and to the separate mineral estate which was created by virtue of the exceptions and reservations. **Saulsberry v. Maddix,** 125 F. 2d 430 (6th Cir. 1942).

The excepting and reserving clauses contained two separate provisions, each having a different and unrelated affect upon the interests involved. The two separate provisions were: *(1) This conveyance made subject to all oil and gas leases of record that are still in force; (2) also except all coal and mineral rights heretofore conveyed, if any.* Each of the two restrictions are completely independent of the other, and either one without the inclusion of the other would have had, and did have, the effect of excluding from the conveyances the particular mineral covered by each individual exception and reservation. For example, if the provision relating only to the oil and gas leases had been present without the provision excepting all coal and mineral rights then under such circumstances only the oil and gas would have been excluded from the deeds. The affect is different, however, by virtue of the grants containing the clause relating to the exception of all coal and mineral rights, inasmuch as by reason of that restriction alone all coal, mineral rights, oil and gas, and all other minerals of whatever type and nature would have been, *and were, effectively excluded and retained by the former landowners.* Thus, by reason of the particular wording used in said clauses all of the coal and mineral rights were excepted and reserved regardless of any oil and gas leases that might have been enforced at the time the deeds were executed.

And it is an affirmed rule under both state and federal law that the term "minerals" includes oil and gas as well as solid minerals. This Court stated in **Northern Pacific R. Co. v. Soderberg**, 188 U. S. 526, 23 S. Ct. 365, 47 L. Ed. 575, that the words mineral deposits included all lands chiefly valuable for other than agricultural purposes, and particularly as included non-metallic substances, among which are petroleum. *And this Court squarely held that the term mineral included gas and oil* in **Burke v. Southern Pacific R. Co.**, 234 U. S. 669, 34 S. Ct. 907, 58 L. ed. 1527.

The United States in acquiring the vast majority of the lands through individualized, open and voluntary negotiations did not seek, did not pay for, and did not acquire the mineral rights in and to said property.

2. The terms and conditions agreed upon by the government and the landowners in federal condemnation proceedings are controlling and binding upon the government.

It is uncomprehendable to the Amicus Curiae, under any conceivable reasoning, as to how the United States could acquire *what it did not wish, did not seek, and did not pay for.*

This Court has consistently held that when the government condemns land the terms, conditions and consideration, when agreed upon by the government and landowner, become controlling and binding upon the federal government as well as the landowner. **Danforth v. United States**, 308 U. S. 271, 60 S. Ct. 231, 84 L. Ed. 240; **United States v. Bethlehem Steel Corp.**, 315 U. S. 289, 62 S. Ct. 581, 86 L. Ed. 855; **United States v. Two Acres of Land, etc.**, 144 F. 2d. 207 (7th Cir. 1944).

3. State interests, in regard to property arrangements, and particularly in regard to the state's legal interpretation relative to title and ownership of property including exceptions and reservations of specific interest should not be overridden by the federal courts.

If the lower Federal Courts, or any other court, can ignore the stipulated facts, the clear and unequivocal language of a contract or deed of conveyance and find in consequence that the agreement or deed of conveyance means something other than it plainly states, the sanctity of contract and property rights which the federal Constitution insures is rendered meaningless.

It is the proposition of this Amicus Curiae, and on behalf of the citizens of this Commonwealth, that this Court, in the absence of specific congressional action, cannot, under all of that which is equitable and just, decree to the federal government a preferred right which would require overriding a state law dealing with the intensely local interest of real property and the protection of past and future purchasers of property within the state.

The Commonwealth of Kentucky, as each other state, has its own peculiar and complex property arrangements, and its own laws governing real property, which are tailored to fit the specific and individualized needs of this state. *There is no federal law, known to the Amicus Curiae, relating to exceptions and reservations of mineral interest when there has been a separate conveyance of the surface. And it is urged that this Court should not here invent one and impose it upon the Commonwealth of Kentucky, its inhabitants, and upon the commerce and industries which provide each and all the necessary monetary requirements.*

This Court in a recent case, which could not by any possible standards involve the substantial interest present in

this cause, *held that the United States could not by judicial fiat and with total disregard of state laws relative to property arrangements devise a federal doctrine of real property which would override the already developed law of the state when the interest of the national government will not suffer major damages.* **United States v. Yazell,** 382 U. S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404.

Unquestionably, the interest in and to the minerals underlying Camp Breckenridge, Kentucky, were not acquired by the federal government. *The decisions rendered by each of the lower courts, however, erroneously failed to make any findings whatsoever relative to the minerals retained by the former landowners.* These decisions regardless of any specific mentioning of the minerals will be determinable of the question presented by this Amicus Curiae, and as a consequence thereof the rights and interests of the Petitioners, citizens of this state, and the various industries will be irrevocably determined by these decisions, or the decision of this Court.

II.

The United States Did Not Acquire a Fee Simple Interest in the Land—and Any Holding to the Contrary Will Effectuate an Unconstitutional Taking of Petitioners Property.

1. The Commonwealth of Kentucky knows the application of its own laws better than the federal courts do!

The Amicus Curiae cannot let go unnoticed the finding by the Court of Appeals, that even if Kentucky law applied, the United States would still have obtained a fee simple title. This finding by the Court of Appeals represents an incorrect and untrue statement of the applicable and proper principle of law in this Commonwealth. And this Amicus Curiae feels that it knows its own laws and

their application better than the federal court, or any other court.

An extensive amount of time, money, and work has been expended by the Amicus relative to the laws of Eminent Domain proceedings in this state. And the accurate rule of law, contrary to what the Court of Appeals found is:

> "*It is well settled that when land is taken for a public use unless a fee is necessary for the purposes for which the land is taken or the statute expressly provides for the acquisition of the fee, the public acquires only an easement.* The public easement or servitude extends to all uses directly or incidentally conducive to the advancement of the purpose for which the land was acquired and to no others, and the owner retains the title to the land in fee and the right to make any use of it that does not interfere with the full and free exercise of the public easement. 18 Am. Jur. 741, Section 115. To the same extent in 3 Nichols On Eminent Domain 278, Section 9.2 (4). See McGee v. City of Williamstown, 308 S. W. 2d 795 (1957), in which the Court stated that it is a settled rule of law in this state that a deed executed pursuant to a condemnation proceeding ordinarily conveys an easement in the condemned property. *The Court held that although the commissioners' deed executed pursuant to the proceedings by the city to condemn land for water supply purposes purported to convey a fee simple title, the words of the deed were not controlling, and the condemnor acquired only an easement.*"

Schwab, **Eminent Domain Procedure**, Legislative Research Commission (1965), p. 75.

And the above proposition of this Amicus was pronounced more strongly by Professor Richardson in his works entitled **Kentucky Practice** (2d ed., 1968), Sec. 479, pp. 557-558:

"Though as stated, a fee simple title may under certain circumstances be taken by the condemnor, such intent must be clearly shown, *and it would seem that necessity for such title must be apparent.* This supposition follows from the rule that condemnation statutes are strictly construed, and that where the estate or interest is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to answer the public purpose in view. *A warranty deed conveying 'right of way' in fee simple to a railroad company in* consideration of the construction of railroad tracks thereon and operation of a railroad and the additional consideration of one dollar, *was held to convey an easement and not a fee simple title, so that upon abandonment of the railroad the land reverted to the grantor or its successor in title. The court in this case was of the opinion that an unconditional conveyance for a specific purpose, namely, right of way, did not convey the fee, and there was an abandonment where the company removed its tracks and attempted to sell the right of way.* Here the intention of the parties and the consideration were of weight in the decision reached.

"It is a fundamental rule of eminent domain that property acquired for a certain purpose may not be diverted to another use by the condemnor. If the new use is of entirely different character, the public easement is lost."

By reason of the foregoing cited authorities, it is obvious that the Court of Appeals *jumped before they looked.* Regardless, however, of the errors committed below, and there were many, it is respectfully requested that this Court now correct those irregularities and render an adequate and just decision.

CONCLUSION.

The Commonwealth of Kentucky as Amicus Curiae, and for the reasons set out in this Brief, and for the reasons assigned by the Petitioner in his Motion for Leave to File Petition for Rehearing, for the reasons designated in his Petition for Rehearing and Petition for Certiorari, all of which are adopted as additional grounds by the Amicus, respectfully urges that this Court grant Petitioner's Petition for Rehearing, to grant Writ of Certiorari, and to remand his cause to the Court of Appeals with directions to vacate its judgment and to remand the cause to the District Court for further proceedings.

The Commonwealth further requests that this Court apply the equitable rule that was expressed by the Court in granting a Petition for Rehearing upon the application of an Amicus Curiae in **Green v. Biddle**, 8 Wheat. (U. S.) 1, 5 L. ed. 547.

Respectfully submitted,

MERRITT S. DEITZ,
State Capitol Building,
Frankfort, Kentucky 40601,
Attorney for Amicus Curiae,
The Commonwealth of Kentucky.

APPENDIX.

APPENDIX A.

WARRANTY DEED

This Deed made and entered into this 6th day of March, 1943, between Nealie Tapp, unmarried, and Byron Tapp & Louise Tapp, his wife, parties of the first part, and the United States of America, party of the second part;

Witnesseth, that said parties of the first part, for and in consideration of the sum of Two Thousand Five Hundred and no/100 Dollars ($2,500.00), the receipt of which is hereby acknowledged, do hereby sell and convey to party of the second part, its successors and assigns forever, the following described real estate lying in Webster County, Kentucky, viz.:

Beginning at a point in the center of the Highland Creek Ditch, corner to Clarence Tapp; thence with the line of Chester Ramsey and Y. M. Gibson S 37° 45′ W 78 poles to a point in the line of R. L. Higginson; thence with his line S 55° 20′ E 4 poles; thence S 14° 25′ W 132.5 poles; thence with the line of R. L. Higginson and Rose Bridwell and Cates Branch S 68° 30′ E 29 poles to a corner of Robert F. Tapp; thence with his lines and the center of Cates Branch N 05° E 9 poles; thence the following courses with Cates Branch N 39° 06′ W 12 poles; thence N 06° 26′ E 5.5 poles; thence N 88° 26′ E 6 poles; S 52° 05′ E 13 poles; thence N 83° 35′ E. 4.5 poles; thence N 46° E 15 poles; thence S 89° 15′ E 10.5 poles; thence N 13° 40′ E 8.5 poles; thence N 61° 25′ E. 6.5 poles; thence N 20° E 8.5 poles; thence S 76° 35′ E 11 poles; thence N 26° E 16 poles; thence S 75° 15′ E 6 poles; thence N 31° 20′ E 5 poles; thence N 02° 55′ W

19.5 poles; thence N 65° 40′ E 6 poles; thence N 28° 20′ E 7 poles to a corner of J. D. Tapp; thence with his lines and the center of Cates Branch the following courses N 07° 20′ W 19 poles; thence N 35° 55′ E. 6.5 poles; thence N 12° 40′ W 6 poles; thence N 60° 50′ W 7 poles; thence N 06° 55′ W 9.6 poles; thence N 52° E 10.5 poles; thence N. 22° 85′ E 10.5 poles; thence N 10° 36′ W 22 poles to a point in the center of Highland Creek Ditch and Cates Branch, corner to Clarence Tapp; thence with his lines and the center of the Highland Creek Ditch N 51° 20′ W 27 poles; thence N 26° 40′ W 21 poles to the beginning, containing 77.7 acres, more or less.

Nealie Tapp and Byron Tapp, jointly, acquired title to the above described property through the following deeds, to-wit: C. D. B. 6, page 47; Deed Book 78, page 312; Deed Book 81, page 587; and Deed Book 78, page 503, all in the Webster County Court Clerk's office.

This conveyance made subject to all oil and gas leases of record that are still in force, also except all coal and mineral rights heretofore conveyed, if any.

The first parties also quit-claim and convey to the second party all of their right, title and interest, if any, in and to any and all of the property adjoining and abutting the above described property.

To Have and to Hold the same with all the appurtenances thereon, to the party of the second part, its successors and assigns forever, with a covenant of "General Warranty."

Witness our hands the day and year above written.

/s/ Byron Tapp,
/s/ Louise Tapp
/s/ Nealie Tapp.

State of Kentucky, } Sct.
County of Webster. }

I, Ben M. Strother, a Notary Public for the County and State aforesaid, certify that on March 6th, 1943, the foregoing deed was produced before me in my county and acknowledged by Byron Tapp and Louise Tapp, his wife, and Nealie Tapp, unmarried, to be their free act and deed.

Witness my hand this 6th day of March, 1943.

/s/ Ben M. Strother,
Notary Public, Henderson County, Ky.

My commission expires the 3rd day of December, 1944.

State of Kentucky, } Sct.
County of Henderson. }

I, Susie M. Letzinger, Clerk of the County Court for the County and State aforesaid, do certify that on the 10 day of March, 1943, the foregoing deed was produced to me in my office and lodged for record. Whereupon I have truly recorded the same together with this and preceding certificate in my office.

This 10 day of March, 1943.

/s/ Susie M. Letzinger,
Clerk,
By /s/ Doris Miller,
D. C.

Attorney General's File No. 33-18-123-357

Option Contract No. W-2203-ENG 32655

APPENDIX B.

Kentucky Revised Statutes, Sections 11.070 and 12.210.

KRS 11.070. **Governor may employ skilled or professional services.**—The Governor may employ reputable, qualified, experienced auditors, accountants, clerks, bookkeepers and any other skilled or professional services to perform any service which the Governor deems proper and may direct.

Attorneys, Governor may employ or approve employment of, KRS 12.210.

KRS 12.210. **Power of Governor or state department to employ attorneys; compensation; employment by more than one department.**—(1) The Governor, or any department with the approval of the Governor, may employ and fix the term of employment and the compensation to be paid to an attorney or attorneys for legal services to be performed for the Governor or for such department. Before approving the employment of an attorney the Governor shall consult the Attorney General as to whether legal services requested by departments are available in the Attorney General's office. The compensation and expenses of any attorney or attorneys employed under the provisions of this section shall be paid out of the appropriations made to such department as other salaries, compensation and expenses are paid, except when the terms of employment provide that the compensation shall be on a contingent basis, and in such event the attorneys may be paid the amount specified out of the moneys recovered by them or out of the General Fund. If the Governor approves the employment, the terms of employment shall be duly entered by Executive Order upon the Executive Journal in the office of the Secretary of State.